

Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning

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Such is the dilemma of the woman speaker. That the categories of patriarchal language distort what she might like to say is no longer in question. Whether she is a literary critic or theorist, poet, linguist, philosopher, sociologist, or natural scientist [or lawyer], the formalities of her discipline, the syntax of its proper practice, the canons of its acceptable style have been exposed as carrying the sexist reasoning it is her task to replace. . . . Once conceptualized in traditional categories, feminist protest may already have capitulated to the political order reflected in disciplinary structures. Concepts such as "utility" and "rights" . . . may not be usable by feminists when it is understood that such terms belong, and have their meaning, within a bourgeois society founded on a view of "man" and "man's place" which is unacceptable.¹

Law reaches every silent space. It invades the secrecy of women's wombs. It breaks every silence, uttering itself. Law-language, jurisdiction. It defines. It commands. It forces.²

The starting point of feminist work must be found in women's lives and not in legal definitions.³

Language matters. Law matters. Legal language matters.

I make these three statements not to offer a clever syllogism, but to bluntly put the central thesis of this Article: it is an imperative task for feminist jurisprudence and for feminist lawyers—for anyone concerned about what the impact of law has been, and will be, on the realization and meanings of justice, equality, security, and autonomy for women—to turn critical attention to the nature of legal reasoning and the language by which it is expressed. As I exhorted in a recent article, feminist legal theorists "must start to grapple with the nature of law itself, to understand the extent to which it is male defined, and the extent to which its language and its process of reasoning are built on male conceptions of problems and of harms—and on male, or epistemologically 'objective' and 'neutral,' methods of analysis. If the law has been defined largely by

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¹ Nye, *Woman Clothed With the Sun: Julia Kristeva and the Escape From/To Language*, 12 SIGNS: J. WOMEN IN CULT. & SOC'Y 664, 665, 671 (1987).

² Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L.J. 355, 355 (1989) (hereinafter Ashe, *Zig-Zag Stitching*).

³ *Introduction to Special Issue: Feminist Perspectives on Law*, 14 INT'L J. SOC. OF L. 233 (1986).

men, and if its definitions, which are presumed to be objective and neutral, shape societal judgments as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately redress women's experiences of harm?"⁴ This Article is my effort to take up my own call, and to push beyond my beginning reflections in the previous article.

I. Why We Must Think About the Power and Limitations of the Legal Voice

Language, and the thoughts that it expresses, is socially constructed and socially constituting. Rather than being neutral or naturally ordained, it reflects the world views and chosen meanings of those who have had power to affect definitions and create terms. The selected terms and meanings then shape our understandings of what things are, of the way the world is.⁵ Careful attention to the language we use can reveal hidden but powerful assumptions framing the way people think about the world. The persistence of the language then entrenches the way of thinking that it expresses. For example, the fact that we need to have modifiers such as "working" or "single" or "welfare" for the supposedly neutral term "mother" signifies that our cultural understanding of the unadorned word "mother" is a woman who is married, being supported by her husband, and not working outside the home. This is the norm for "mothers"—all other types of mothers are subtly deviant.⁶ Similarly, the use of the term "minorities" to refer to people who actually collectively are the great majority of people in the world reflects and reinforces the deep and pernicious assumption in Western societies that white people are the norm for humanity.⁷ Moreover, the usual conjunction "women and minorities" suggests that although linked, the two terms are also exclusive of each other. This use of language not only reflects and reinforces the white male norm, but also signifies and reinforces the view that "women" means white women and "minorities" means "men who are not white."⁸ Women of color are thus signified as twice removed from the norm, as all the more problematic, as slipping

4 Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 Nw. U.L. REV. 352, 384 (1988) (hereinafter Finley, *Nature of Domination*).

5 Examples of works that develop these points are F. JAMESON, *PRISON-HOUSE OF LANGUAGE; A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* (1972); G. LAKOFF, *METAPHORS WE LIVE BY* (1980); R. LAKOFF, *LANGUAGE AND WOMEN'S PLACE* (1975); D. SPENDER, *MAN MADE LANGUAGE* (2d ed. 1985). Indeed, within structuralist linguistics and anthropology, the term "language" "is used to mean not simply words or even a vocabulary and set of grammatical rules, but rather, a meaning constituting system: that is, any system—strictly verbal or other—through which meaning is constructed and cultural practices organized and by which, accordingly, people represent and understand their world." Scott, *Deconstructing Equality Versus Difference: Or, The Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 34 (1988) (hereinafter Scott, *Deconstructing Equality*).

6 G. LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 80-81 (1987).

7 See Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 13 n.16 (1987).

8 The title of the anthology about black women's studies, *ALL THE WOMEN ARE WHITE, AND ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE* (G. Hull, P. Scott & B. Smith, eds. 1982), reflects the absence of women of color from the usual terminology "women and minorities."

into invisibility.⁹ Similarly, the term "gender" is too often taken to be a shorthand for "women." The body of law about gender discrimination is widely understood to involve "women's issues"—thus reinforcing the understanding that "man" is a genderless, standard creature who does not have to concern himself with gender issues.¹⁰ Given the way in which language creates meaning through differentiation, with "man" as the linguistic stand-in for "generically human," "women," "women's issues," and "women's perspectives" are understood as partial, both in the sense of being incomplete and being biased.¹¹

Law is, among other things, a language, a form of discourse,¹² and a system through which meanings are reflected and constructed and cultural practices organized. Law is a language of power,¹³ a particularly authoritative discourse. Law can pronounce definitively what something is or is not and how a situation or event is to be understood. The concepts, categories, and terms that law uses, and the reasoning structure by which it expresses itself, organizes its practices, and constructs its meanings, has a particularly potent ability to shape popular and authoritative understandings of situations. Legal language does more than express thoughts. It reinforces certain world views and understandings of events. Its terms and its reasoning structure are the procrustean bed into which supplicants before the law must express their needs. Through its definitions and the way it talks about events, law has the power to silence alternative meanings—to suppress other stories.

For example, the terminology used in the infamous *Baby M* case of "surrogate" mother, rather than "birth mother" or "gestational mother," expresses and entrenches a preference for viewing the situation contractually. The terminology removes the birth mother from the experience of pregnancy and nurturing and turns her into a mere participant in a business matter, an at arm's length transaction with a definite end point to her position as "surrogate." Thus, the media, legal scholars, and law students hotly debated whether a child was an appropriate item of contract, and whether the contract should be specifically enforced.

9 For discussions of how this presents seemingly intractable difficulties for anti-discrimination law to address the undivided realities of women of color, see Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Scarborough, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989); Austin, *Sapphire Unbound* (1988) (unpublished manuscript).

10 For example, I have often wondered why so few men take law school courses denominated as about gender. I have occasionally asked some male students this question, and they look quite surprised when asked as they explain to me that such courses have nothing to do with *them*.

11 See, e.g., J. SCOTT, *GENDER AND THE POLITICS OF HISTORY* 174 (1988).

12 The term "discourse" as used in poststructuralist theory, especially as developed in the work of Michel Foucault, "is not a language or a text but a historically, socially, and institutionally specific structure of statements, terms, categories, and beliefs. Foucault suggests that the elaboration of meaning involves conflict and power, that . . . the power to control a particular field resides in claims to (scientific) knowledge embodied not only in writing but also in disciplinary and professional organizations, in institutions . . . , and in social relationships Discourse is thus contained or expressed in organizations and institutions as well as words; all of these constitute texts or documents to be read." Scott, *supra* note 5, at 35.

13 Cf. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) (the power of the word of law is also a form of violence, particularly when the power is being exercised upon those whose perspectives and experiences have not informed or been heard in the legal definitions).

Distorted and lost in this debate was Mary Beth Whitehead's understanding of the experience of pregnancy. Her efforts to express her powerful, complex feelings for her child were hardly excuses for breaking a contract, in the view of the trial judge.¹⁴

Another example of the power of legal pronouncements to shape public understandings is provided by the much discussed recent case of Tawana Brawley.¹⁵ The grand jury's conclusion, orchestrated by the special prosecutor, that Tawana Brawley was not the victim of a criminal sexual assault by four white men has shaped people's understanding that "nothing happened."¹⁶ The legal pronouncement is deemed definitive of what happened. Few stop to think that when a young black woman in a racist society is found in a garbage bag after being reported as missing for several days, dazed, and her naked body smeared with racial slurs written in feces, "nothing" is not what happened. Whether she herself or someone else put her in that bag in that condition, something, and something quite drastic, certainly happened. And now that the law has pronounced "what happened," Tawana's own story, and the story of blacks who saw in the event the need to express outrage, either will never be heard, or can now be dismissed as "not true." The law, with its limited (time-wise and conduct-wise) concern over a narrow set of explanations, has authoritatively shaped the understanding of the event as being only about whether on a particular day she was the victim of a particular form of illegal abuse. It is not relevant in the language of the law, and so it is "nothing" to us, that she might have been driven to the act to escape and to draw attention to other forms of abuse she was suffering, such as abuse by her stepfather or the abuse of being a black woman in this society.

Another example is the law's appropriation of the word "discrimination," which means to differentiate, to make a distinction in favor of or against a person or thing because of a group characteristic rather than individual merit. Much of the political, historical, and moral content of "equality" has been dropped with this term. An understanding of the role of power, domination, and oppression as the source of the evil of making "discriminations" recedes into the neutralized word "discrimination." Thus we come to understand any race-based distinction, no matter what its historical impetus and purpose, and no matter whether it

14 See Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988) (hereinafter Ashe, *Law-Language of Maternity*).

15 For an account of the case and an important perspective on its cultural meaning, see Omo-lade, *Black Women, Black Men, and Tawana Brawley—The Shared Condition*, 12 HARV. WOMEN'S L.J. 11 (1989).

16 Several friends and family members with whom I discussed the case used the terminology "nothing happened" to describe the grand jury's conclusion that no indictment was warranted. This tendency to equate the legal judgment that there is insufficient evidence of a particular crime with "nothing [that we need to care about] happened" is also reflected in comments I have heard rape victims make after a prosecutor declines to prosecute or a jury fails to convict: "Oh dear, I guess that means people think nothing happened." Cf. R. WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE (1988), discussed *infra*, text accompanying notes 100-03.

contributes to or helps reduce domination and oppression, to be forbidden discrimination.¹⁷

Legal terminology does more than simply reflect prevailing ways of thinking about situations. An important aspect of its power is the fact that changes in how a situation is characterized can affect how the law approaches and resolves it. Whether the *Baby M* case is called a contract dispute or a custody dispute affects more than how we think about the situation. The choice of characterization can affect the legal outcome and profoundly alter the lives of all the people involved. As Martha Fineman has perceptively demonstrated in her analysis of the discourse governing child custody decisionmaking,¹⁸ the shift from the legal rhetoric of divorce and terminating the parental relationship, to the helping rhetoric of social work which emphasizes restructuring the family relationship, has had a major impact on custody disputes and on mothers' rights and abilities to reconstruct their lives after divorce. The mothers' perspective about the significance of past parenting behavior has become a voice silenced and ignored by the new dominant legal rhetoricians.

Another significant feature of legal language is its conservatism. By always referring back to what has previously been defined, by building on precedent, legal language tends to stabilize and reflect the status quo, rather than to reach for radical understandings. Understandings that do not neatly match the existing definitions are suspect as radical, unthinkable, unexpressable, and unreachable by legal language.¹⁹

Because legal reasoning and the language by which it is expressed have the power to construct and contain individual and cultural understandings of situations and social relationships, they can inhibit change. In light of this power, those who seek to use law to help empower and positively change the status of a group such as women must, in their theory and practice, be concerned with the origins, nature, and structure of legal language and legal reasoning. To tame the beast you must know the beast. Thus, a crucial project for feminist jurisprudence must be to ask constantly and critically who has been involved in shaping law, in selecting and defining its terms, and in deciding what is and is not one of those terms. Whose understandings, philosophy, and world view are imprinted on law? Consequently, how neutral and how inclusive is the structure of legal reasoning?

I regard this critical inquiry into the nature of legal reasoning and language as a connecting bridge between the supposedly dichotomous worlds of theory and practice. Feminist jurisprudential theory can inform lawyers concerned with using law to achieve equality and autonomy for women—and with infusing law with more of women's (and more wo-

17 See, e.g., *City of Richmond v. Croson*, 109 S. Ct. 706 (1989).

18 Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

19 An example, discussed *infra* note 23 and accompanying text, is the effort by some feminists to replace the existing definition of obscenity with a definition of pornography which focuses on harm to women. Courts have rejected this new definition precisely because it does not fit the existing definition of obscenity. See *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); see also Finley, *The Nature of Domination*, *supra* note 4.

men's) understanding(s) of these contested terms. The insights offered by feminist theory into epistemology and the patriarchal nature of law, and its conclusions about the pros and cons of appropriating existing legal meanings and trying to make the unchanged terms fit women's experiences, can provide creative guidance to lawyers. Feminist theorists who are interested in epistemological issues, in power and the way it is perpetuated, and in deconstructing dichotomies such as equality/difference that seem to disempower women, can gain insight from the experiences of feminist lawyers. At times, these lawyers have found themselves constrained by the power of legal discourse and have tried to alter the meaning of legal terms, such as sex discrimination, self-defense, and rape. At other times these lawyers have used successfully liberal legal frameworks such as "arguing about equality means arguing about sameness/difference." Those of us who practice and think law primarily by writing and teaching about it, as well as those who practice and think law primarily by litigating, lobbying, counseling, and negotiating about it, must reflect about what it is that we are buying into when we use the existing terms of law and wholly accept the existing constructs of its reasoning. How will the legal language shape, confine, constrain, or direct our aspirations and our understandings of our situation? Will the existing terms and their embedded meanings inescapably cabin or undermine our goals? This is a necessary subject of reflection if we are to deal with why it seems to be so hard for women to fit their experiences within legal language. Why do so many efforts to use existing legal terms and doctrines, such as equality, privacy, discrimination, and civil rights, wind up being unsuccessful?²⁰ Why do those efforts sometimes lead to perverse unanticipated results?²¹ Why on other occasions do they get us into stalled or circular debates, such as "equal treatment/special treatment,"²² or "regulate pornography/protect the first amendment,"²³ that do not capture either the nature of the problem to be addressed or the shared goals and concerns of many of the debaters? If we do not think about what produces the frequent sense of one step forward-two steps back when we try to use law to affect change for women, but just go on grabbing at the existing language, we are unlikely to tap any positive potential in law as a source of beneficial social change for women or other disempowered, silenced, marginalized people.

20 The initial legal challenges to the exclusion of pregnancy from employers' disability insurance plans is one example.

21 The adverse economic effects of the equality movement in divorce reform on women is a compelling example. See L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); Fineman, *Implementing Equality: Ideology, Contradiction & Social Change—A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789; Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Reform in New York State*, 37 BUFFALO L. REV. 395 (1989).

22 See Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986) (hereinafter Finley, *Transcending Equality*).

23 Compare Catherine MacKinnon's efforts to make pornography actionable harm, see C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), with the Feminist Anti-Censorship Task Force (F.A.C.T.) opposition to her ordinance. Brief Amicus Curiae of F.A.C.T., *American Booksellers v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986), *reprinted in* 21 U. MICH. J.L. REF. 69 (1988).

II. The Gendered Nature of Legal Language Is What Makes it Powerful and Limited

A. *Why Law is a Gendered (Male) Language*

Throughout the history of Anglo-American jurisprudence, the primary linguists of law have almost exclusively been men—white, educated, economically privileged men.²⁴ Men have shaped it, they have defined it, they have interpreted it and given it meaning consistent with their understandings of the world and of people “other” than them. As the men of law have defined law in their own image, law has excluded or marginalized the voices and meanings of these “others.”²⁵ Indeed, there have even been evidentiary rules of law that forbade, or declared unworthy of belief without “objective” corroboration, the testimony of women or blacks.²⁶ Law, along with all the other accepted academic disciplines, has exalted one form of reasoning and called only this form “reason.” Because the men of law have had the societal power not to have to worry too much about the competing terms and understandings of “others,” they have been insulated from challenges to their language and have thus come to see it as natural, inevitable, complete, objective, and neutral.²⁷

Thus, legal language and reasoning is gendered, and that gender matches the male gender of its linguistic architects.²⁸ Law is a patriarchal

24 Even the recent entry into law of nonwhite men and women and white women has consisted of people schooled in, and indoctrinated with, the language and reasoning constructs of the white men who defined law and all other exalted disciplines of study. It has only been as some of these new entrants have tapped into theoretical sources, including experience and feeling, that challenge the white men's language/theory system that changes in law other than demographic changes or small doctrinal expansions have started to be discussed actively and to seem possible. See Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

25 *Id.*

26 See L. White, *Unearthing the Barriers to Women's Speech: Notes Toward a Feminist Sense of Procedural Justice* (1988) (unpublished manuscript presented at the Feminism and Legal Theory Conference on Women and Power, University of Wisconsin Law School and Institute for Legal Studies, Madison, Wisconsin) (forthcoming in 38 BUFFALO L. REV. (1990)).

27 The critique of objectivity and neutrality as not what they claim to be but as partial, male-biased perspectives is a standard and crucial part of current feminist theory that has moved beyond being merely reformist to challenging the foundations of disciplines. I have developed it elsewhere, see Finley, *Transcending Equality*, *supra* note 22; and Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914 (1987) (hereinafter Finley, *Choice and Freedom*). In feminist legal theory, its best known expositor, and one of the first to promote it, is Catherine MacKinnon. See MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULT. & SOC'Y 515 (1982) (hereinafter SIGNS I); MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN IN CULT. & SOC'Y 635 (1983) (hereinafter SIGNS II); see also C. MacKinnon, *FEMINISM UNMODIFIED*, *supra* note 23. For examples from other disciplines, see C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); S. HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) (hereinafter S. HARDING, *THE SCIENCE QUESTION*); A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

28 Some linguistic theorists have posited, compellingly I believe, that all language, as we currently know it, is male. See D. SPENDER, *supra* note 5. Consequently, some feminist theorists say that in order to escape patriarchy, women need to create a new language all their own, emanating from their bodies/embodyed selves. See, e.g., M. DALY, *GYN/ECOLOGY, THE META-ETHICS OF RADICAL FEMINISM* (1978). Consider also French feminist theorists such as Luce Irigaray and Julia Kristeva. See *NEW FRENCH FEMINISMS: AN ANTHOLOGY* (I. de Courtivron & E. Marks eds. 1981).

form of reasoning,²⁹ as is the philosophy of liberalism of which law (or at least post-Enlightenment Anglo-American law) is a part.³⁰

The claim that legal language and reasoning is male gendered is partly empirical and historical. The legal system and its reasoning structure and language have been framed on the basis of life experiences typical to empowered white males. Law's reasoning structure shares a great deal with the assumptions of the liberal intellectual and philosophical tradition, which historically has been framed by men.³¹ The reasoning structure of law is thus congruent with the patterns of socialization, experience, and values of a particular group of privileged, educated men. Rationality, abstraction, a preference for statistical and empirical proofs over experiential or anecdotal evidence, and a conflict model of social life corresponds to how these men have been socialized and educated to think, live, and work.

My claim that legal reasoning and language are patriarchal also has a normative component, in the sense that male-based perspectives, images, and experiences are often taken to be the norms in law. Privileged white men are the norm for equality law;³² they are the norm for assessing the reasonable person in tort law;³³ the way men would react is the norm for self-defense law;³⁴ and the male worker is the prototype for labor law.³⁵

By calling legal reasoning and language male, or patriarchal, I am not making a biologic-essentialist argument. I am not saying that only, or all, persons of the male sex talk and think this way, nor that this is inherently always the language and reasoning persons of the male sex will use. Indeed, because it is a powerful and often useful way of reasoning, many women have become adept at it and willingly wield the tools of the powerful male tradition. Rather, legal language is a male language because it is principally informed by men's experiences and because it derives from the powerful social situation of men, relative to women. Universal and objective thinking is male language because intellectually, economically, and politically privileged men have had the power to ignore other perspectives and thus to come to think of their situation as the norm, their reality as reality, and their views as objective. Disempowered, marginalized groups are far less likely to mistake their situa-

29 For developments of this theme, see Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 294 (D. Kairys ed. 1982); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 *HARV. WOMEN'S L.J.* 83 (1980).

30 One of the best critiques of liberalism as a patriarchal form of reasoning is A. JAGGAR, *supra* note 27.

31 Women did not begin to enter the universities in which this tradition was developed and entrenched until the end of the nineteenth century. See, e.g., B. SOLOMON, *IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA* (1985).

32 See *infra* text accompanying note 55.

33 See Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. LEGAL EDUC.* 3 (1988); Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 *YALE J.L. & FEMINISM* 41 (1989) (hereinafter Finley, *A Break in the Silence*).

34 See, e.g., *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 *HARV. C.R.-C.L. L. REV.* 623 (1980).

35 See, e.g., Conaghan, *The Invisibility of Women in Labour Law: Gender-Neutrality in Model-Building*, 14 *INT'L J. Soc. OF L.* 377 (1986).

tion, experience, and views as universal.³⁶ Male reasoning is dualistic and polarized thinking because men have been able, thanks to women, to organize their lives in a way that enables them not to have to see such things as work and family as mutually defining. Men have acted on their fears of women and nature to try to split nature off from culture, body from mind, passion from reason, and reproduction from production.³⁷ Men have had the power to privilege—to assign greater value to—the side of the dichotomies that they associate with themselves. Conflict-oriented thinking, seeing matters as involving conflicts of interests or rights, as contrasted to relational thinking, is male because this way of expressing things is the primary orientation of more men than women.³⁸ The fact that there are many women trained in and adept at male thinking and legal language does not turn it into androgynous language—it simply means the women have learned male language, as many French speakers learn English.³⁹

The claim that law is patriarchal does not mean that women have not been addressed or comprehended by law. Women have obviously been the subjects or contemplated targets of many laws. But it is men's understanding of women, women's nature, women's capacities, and women's experiences—women refracted through the male eye—rather than women's own definitions, that has informed law.⁴⁰ As Robin West said in analyzing "masculine jurisprudence:"

[T]he distinctive values women hold, the distinctive dangers from which we suffer, and the distinctive contradictions that characterize our inner lives are not reflected in legal theory because legal theory (whatever else it's about) is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law protect, value, or seriously regard our experience. Jurisprudence is "masculine" because jurisprudence is about the relationship between human beings and the laws we actually have, and the laws we actually have are "masculine" both in terms of their intended beneficiaries and in authorship. Women are absent from jurisprudence because women *as human beings* are absent from the law's protection: jurisprudence does not recognize us because law does not protect us.⁴¹

One notable example of a male judicial perspective characterizing women as men see them is the often-flayed U.S. Supreme Court decision in *Bradwell v. Illinois*,⁴² in which Justice Bradley exalted the delicate timid-

36 See N. HARTSOCK, *RETHINKING MODERNISM: MINORITY VERSUS MAJORITY THEORIES*, CULTURAL CRITIQUE No. 7 187, 205 (1987); Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1987).

37 See, e.g., S. GRIFFIN, *WOMAN AND NATURE: THE ROARING INSIDE HER* (1978).

38 This is why Gilligan calls the rights-based ethic the male voice, and the care-based ethic the female voice. She, too, disclaims biological determinism. See C. GILLIGAN, *supra* note 27.

39 Many women law students with whom I have talked have expressed their alienation from the discipline of law and their feelings of being silenced or not heard in law school as analogous to the situation of being forced to become bilingual in a world where those with the power to choose whether to listen speak only one language, and thus the person forced to learn the new language fears the loss of their native tongue.

40 This point is further developed in MacKinnon, *SIGNS II*, *supra* note 27.

41 West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 60 (1988) (emphasis in original).

42 83 U.S. 442 (1873).

ity and biologically bounded condition of women to conclude that women were unfit for the rude world of law practice. Another example is the decision in *Geduldig v. Aiello*,⁴³ in which the Court cordoned off the female experience of pregnancy and called this experience unique, voluntary, and unrelated in any way to the workplace.

The legal definition of rape provides another example of the male judicial perspective. It is the male's view of whether the woman consented that is determinative of consent; it is men's view of what constitutes force against men and forms of resistance by men in situations other than rape that defines whether force has been used against a woman and a woman has resisted; it is men's definition of sex—penetration of the vagina by the penis—rather than women's experience of sexualized violation and violation that defines the crime.⁴⁴ The legal view of prostitution as a crime committed by women (and more recently also committed by men playing the woman's role in a sexual encounter with men) with no "victims" is another obvious example. The word "family" and the area of "family law" is yet another example. The norm of "family," the fundamental meaning of the term embedded in and shaped by law, is of a household headed by a man with a wife who is wholly or somewhat dependent on him. Other forms of family—especially those without a man—are regarded as abnormal. To a significant extent, the purpose of the discipline of family law is to sanction the formation of ideal families and to control and limit the formation and existence of these nonideal families, and thus to control the status and lives of women.

B. *The Power and Limitations of Male Legal Language*

Analysis of the way the law structures thought and talk about social problems is necessary to understand how the law can limit our understandings of the nature of problems and can confine our visions for change. The analysis can also be instructive for suggesting strategies for change. I have said above that a male-gendered way of thinking about social problems is to speak in terms of objectivity, of universal abstractions, of dichotomy, and of conflict. These are essentially the ways law talks about social problems.

Modern Anglo-American law talks about social problems within the individualistic framework of patriarchal Western liberalism, a theory that itself has been challenged by feminists as resting on a fundamentally male world view.⁴⁵ This framework sees humans as self-interested, fundamentally set-apart from other people, and threatened by interactions with others.⁴⁶ To control the threat of those who would dominate you or gain at your expense, you must strive to gain power over them. This

43 417 U.S. 484 (1973).

44 See, e.g., S. ESTRICH, *REAL RAPE* (1987); MacKinnon, *SIGNS II*, *supra* note 27.

45 See, e.g., A. JAGGAR, *supra* note 27.

46 See S. HARDING, *THE SCIENCE QUESTION*, *supra* note 27, at 171. See also N. HARTSOCK, MONEY, SEX AND POWER: TOWARD A FEMINIST HISTORICAL MATERIALISM (1985); JAGGAR, *supra* note 45.

power can easily become domination because the point of its exercise is to protect yourself by molding another to your will.

As part of this individualistic framework, law is conceptualized as a rule-bound system for adjudicating the competing rights of self-interested, autonomous, essentially equal individuals capable of making unconstrained choices.⁴⁷ Because of the law's individualistic focus, it sees one of the central problems that it must address to be enforcing the agreements made by free autonomous individuals, as well as enforcing a few social norms to keep the battle of human life from getting out of hand. It envisions another central task to be eliminating obvious constraints on individual choice and opportunity. The constraints are thought to emanate primarily from the state or from the bad motivations of other individuals. An individualistic focus on choice does not perceive constraints as coming from history, from the operation of power and domination, from socialization, or from class, race and gender.⁴⁸ A final key task for individualistic liberal law is to keep the state from making irrational distinctions between people, because such distinctions can frustrate individual autonomy. It is not an appropriate task to alter structures and institutions, to help the disempowered overcome subordination, to eliminate fear and pain that may result from encounters masquerading as "freely chosen,"⁴⁹ to value nurturing connections,⁵⁰ or to promote care and compassion for other people.⁵¹

To keep its operation fair in appearance, which it must if people are to trust resorting to the legal method for resolving competing claims, the law strives for rules that are universal, objective, and neutral. The language of individuality and neutrality keeps law from talking about values, structures, and institutions, and about how they construct knowledge, choice, and apparent possibilities for conducting the world. Also submerged is a critical awareness of systematic, systemic, or institutional power and domination. There are few ways to express within the language of law and legal reasoning the complex relationship between power, gender, and knowledge.⁵² Yet in order for feminists to use the law to help effectuate change, we must be able to talk about the connection between power and knowledge. This connection must be acknowledged in order to demystify the "neutrality" of the law, to make the law comprehend that women's definitions have been excluded and marginal-

47 For an insightful feminist critique of liberal legalism, see West, *supra* note 41.

48 See Finley, *Choice and Freedom*, *supra* note 27.

49 See, e.g., West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 89 (1987) (hereinafter West, *Women's Hedonic Lives*).

50 Tort law, for example, reluctantly and rarely allows recovery for emotional distress caused when a loved one is injured.

51 See, e.g., Bender, *supra* note 33.

52 Cf. S. HARDING, *THE SCIENCE QUESTION*, *supra* note 27, in which Professor Harding suggests that science may be particularly resistant to theorizing about gender because it is an empirical, positivistic discipline and consequently without a tradition of critical inquiry into the social origins of conceptual systems and patterns of behavior, including the concepts and behaviors of scientific inquirers. *Id.* at 33. Law and science share many characteristics in this regard. Despite some tradition of normative theorizing, law is essentially an empirical, positivistic discipline, dedicated, as is science, to objective truth, rather than destabilizing critical inquiry.

ized, and to show that the language of neutrality itself is one of the devices for this silencing.

The language of neutrality and objectivity can silence the voices of those who did not participate in its creation because it takes a distanced, decontextualized stance. Within this language and reasoning system, alternative voices to the one labeled objective are suspect as biased. An explicit acknowledgement of history and the multiplicity of experiences—which might help explode the perception of objectivity—is discouraged. To talk openly about the interaction between historical events, political change, and legal change is to violate neutral principles, such as adherence to precedent—and precedents themselves are rarely talked about as products of historical and social contingencies. For example, in the recent U.S. Supreme Court decision declaring a municipal affirmative action plan unconstitutional, *City of Richmond v. Croson*,⁵³ the majority talks in the language of neutrality, of color-blindness, and of blind justice⁵⁴—and it is the more classically legal voice. The dissent, which cries out in anguish about the lessons of history, power, and domination, is open to the accusation that it speaks in the language of politics and passions, not law.

In legal language, experience and perspective are translated as bias, as something that makes the achievement of neutrality more difficult. Having no experience with or prior knowledge of something is equated with perfect neutrality. This way of thinking is evident in jury selection. A woman who has been raped would almost certainly be excluded as a juror in a rape trial—it is assumed that her lived experience of rape makes her unable to judge it objectively. Legal language cannot imagine that her experience might give her a nuanced, critical understanding capable of challenging the male-constructed vision of the crime. Yet someone with no experience of rape, either as victim, perpetrator, or solacer/supporter of victim, is deemed objective, even though it may be just their lack of experience that leaves them prone to accept the biased myths about women's behavior that surround this crime.

Because it is embedded in a patriarchal framework that equates abstraction and universalization from only one group's experiences as neutrality, legal reasoning views male experiences and perspectives as the universal norm around which terms and entire areas of the law are defined. Examples of this phenomenon abound, and exposing them has been a central project of feminist jurisprudence. Thus, for example, my previous work, as well as that of several others,⁵⁵ has examined how talk about equality, couched in comparative language of same-

53 109 S. Ct. 706 (1989).

54 Speaking of the meaning of images conveyed by the use of language, the law's metaphor for neutrality and justice—blindness—is a curious one considering the meaning of blindness in other contexts. Rather than equating blindness with an objective, whole, universal view, in other language systems blindness means not being able to fully comprehend, being partial because not all senses are able to be employed. The parable of the blind men and the elephant, in which none can imagine the whole, is illustrative of the usual connotation of blindness.

55 See, e.g., Finley, *Transcending Equality*, *supra* note 22; Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987); Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. Spring 1985 at 157.

ness/difference, requires a norm or standard for comparison—and that norm becomes white males. The more a non-white person can be talked about as the same as a white male, the more deserving she or he is to be treated equally to, or the same as, white males. This language not only uses white males as the reference-point, but it also exalts them. To be the same as white males is the desired end. To be different from them is undesirable and justifies disadvantage.

Many doctrinal areas of the law are also fundamentally structured around men's perspectives and experiences. The field of labor law uses a gendered meaning of work—as that which is done for wages outside your own home—as its focus. Thus, any talk about reforming labor law, or regulating work, will always leave unspoken, and thus unaffected, much of what women do, even women who also “work” in the legal conventional sense.⁵⁶ Legal intervention in work—or the perception that no intervention is needed—assumes that workers are men with wives at home who tend to the necessities of life. It is only in this framework that we can even think of work and family as separate and conflicting spheres.⁵⁷

Tort law defines injuries and measures compensation primarily in relation to what keeps people out of work and what their work is worth.⁵⁸ It is in this framework that noneconomic damages, such as pain and suffering or compensation for emotional injuries, which are often crucial founts of recovery for women, are deemed suspect and expendable. In the language of criminal law, the paradigmatic criminal is a male, and women criminals are often viewed as doubly deviant.⁵⁹ Another example of the manifestation of the male reference-points is how self-defense law looks to male notions of threat and response to assess what is reasonable.⁶⁰ Contract law is built around the form of transactions that predominates in the male-dominated marketplace, and doctrines that are regarded as necessary to assist the weak (*i.e.*, helpless women), such as reliance and restitution, are subtly demeaned by the language as “exceptions,” as deviations from the normal rules of contract.⁶¹ All of this suggests that for feminist law reformers, even using the terms “equality,” “work,” “injury,” “damages,” “market,” and “contract” can involve buying into, and leaving unquestioned, the male frames of reference. It also leaves unspoken, and unrecognized, the kinds of work women do, or the kinds of injuries women suffer.

56 For an analysis of the gendered nature of labor law, see Conaghan, *supra* note 35.

57 The paradigm of the male worker is also evident in the structure of the social security system. See M. ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN—SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988). It is also evident in the structure of unemployment insurance, which regards family or reproductive reasons for disengaging from employment as voluntary quits or as rendering a worker unavailable for work, as reasons to disqualify a worker from unemployment compensation. See Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, 10 SIGNS: J. WOMEN IN CULT. & SOC'Y 439 (1985).

58 See Finley, *A Break in the Silence*, *supra* note 33.

59 See Chesney-Lind & Daly, *Feminism and Criminology*, 5 JUST. Q. 497 (1987); Heidensohn, *Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice*, 14 INT'L J. SOC. OF L. 287 (1986).

60 See, e.g., *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977); Schneider, *supra* note 34.

61 See Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985).

The language of law is also a language of dichotomies, oppositions, and conflict. No doubt this is partly attributable to the fact that law so frequently is invoked in situations of conflict—it is called on to resolve disputes, to respond to problems that are deemed to arise out of conflicting interests. Another reason legal language is put in terms of opposing interests is due to its place within an intellectual tradition—Western liberal thought—that orders the world in dualisms: culture/nature, mind/body, reason/emotion, public/private. Law is associated with the “male” and higher valued side of each of these dualisms.⁶² This means that law adopts the values of the privileged side of the dualisms, such as the self-interested, “rational” exchange values of the marketplace, or the shunning of emotion. It also means that legal language has few terms for comprehending in a positive, valuable way the content of the devalued sides of the dualisms—or those, such as women, who are associated with the devalued sides. For example, law’s operation within a perceived dichotomy of public/private, and its preference for the public as the proper area for its concern, leaves law largely ignorant of and unresponsive to what happens to women within the private realm. Thus the “public” language of law contributes to the silencing of women.

The conflict aspect of legal language—the way it talks about situations and social problems as matters of conflicting rights or interests—fosters polarized understandings of issues and limits the ability to understand the other side. It also squeezes out of view other ways of seeing things, nonoppositional possibilities for dealing with social problems. Since a language of conflict means that one side has to be preferred, there will always be winners and losers.⁶³ In a polarized language of hierarchical dualisms set within a patriarchal system, it will often be women, and their concerns, that will lose, be devalued, or be overlooked in the race to set priorities and choose sides.

The special treatment/equal treatment debate over pregnancy leave⁶⁴ is one example of conflict-talk that has proved troublesome for women—they face the danger of losing either way. To insist that women must be treated equally with men when there is a fundamental way in which they differ—they become pregnant—can mean that needs associated with pregnancy are not addressed in the workplace. And to have one’s needs labeled “special” simply because they are not men’s needs, in a society where men’s needs are the unstated reference-point for equality, means any effort to address “special” needs is suspect for violating equality. Round and round, tugging back and forth go the debaters. Feminists are forced to choose sides, only to be denounced by the other side. Meanwhile, both labels, equal treatment and special treatment, prop up the assumption that men are the norm. Both views keep

62 For a discussion of the dualisms that structure liberal legal thinking, see A. JAGGAR, *supra* note 27; F. Olsen, *The Sex of Law* (unpublished manuscript).

63 See, e.g., Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). In these works, Professor Menkel-Meadow discusses ways in which the law makes it hard to talk about and achieve win/win solutions.

64 See Finley, *Transcending Equality*, *supra* note 22.

the needs of workers who also have children mired in polarized sameness/difference equality talk. This talk precludes discussing the needs of pregnant workers as an important human issue of concern to both parents, and as a matter of social responsibility on the part of employers.⁶⁵

Another problematic instance of the language of conflicting rights is the law's approach to issues of women's reproductive freedom. These issues are being framed by the law as conflicts between maternal rights, such as the right to privacy and to control one's body, and fetal rights, such as the right to life, or the right to be born in a sound and healthy state. They are also framed as conflicts between maternal rights and paternal rights, such as the man's interest in reproductive autonomy. To talk about human reproduction as a situation of conflict is a very troublesome way to understand this crucial human event in which the well-being, needs, and futures of all participants in the event, including other family members, are inextricably, sensitively connected. Just because everything that happens to one participant can affect the other does not mean they are in conflict. It suggests, rather, that they are symbiotically linked. The fetus is not there and cannot exist without the mother. An action taken for the sake of the mother that may, in a doctor's but not the mother's view, seem to pose a risk to the fetus, such as her decision to forego a caesarean birth, or to take medication while pregnant, may actually be necessary (although perhaps also still presenting a risk of harm) for the fetus because without an emotionally and physically healthy mother there cannot be a sustained fetus or child.⁶⁶

The language of conflicting interests utterly fails to capture the meaning of the experience of pregnancy to women.⁶⁷ The fetus and woman are one, happily or unhappily. As Natalie Merchant of the group "10,000 Maniacs" sings, a pregnant woman is no longer one separate person, but now she "eat[s] for two, walk[s] for two, breathe[s] for two."⁶⁸ The liberal notion of an isolated autonomous being with an existence separate from all others lacks descriptive reality when applied to pregnant women.⁶⁹ If the pregnancy is wanted, many women may feel an ecstatic connected wholeness with the wonder of their growing body. The developing fetus is not just part of her; it is her, a seamless web.⁷⁰ Whatever is done to or for it, is done *to* her, not just through her. If the pregnancy is unwanted, conflict with an opposed autonomous rights holder still does not encapsulate what many women feel. The feelings may be of terrifying annihilation, of invasion by and surrender of self to

65 In this paragraph I am summarizing the conclusion of my previous article, see Finley, *Transcending Equality*, *supra* note 22. The limitations of legal language for addressing the needs of women has been a consistent theme in my work.

66 For a work that seeks to approach abortion in terms of the connections between mother and fetus, see R. GOLDSTEIN, *MOTHER LOVE AND ABORTION: A LEGAL INTERPRETATION* (1988).

67 For descriptions of this experience as understood by women, and the contrast between women's experience and the medical-legal understanding, see E. MARTIN, *THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION* (1987); Ashe, *Zig-Zag Stitching*, *supra* note 2.

68 10,000 Maniacs, *Eat For Two*, on BLIND MAN'S ZOO (Elektra Asylum Records 1989) (words and lyrics by Natalie Merchant).

69 See West, *Women's Hedonic Lives*, *supra* note 49.

70 See Ashe, *Law-Language of Maternity*, *supra* note 14.

the pregnancy—not of a fight against a separate being. After terminating an unwanted pregnancy, a woman does not feel as though she has vanquished an enemy, but as if she has been given herself back. Overwhelming relief, a sense of autonomy restored—but sometimes a sense of part of herself lost as well.⁷¹

If we stop talking about reproductive issues as issues of opposing interests, but discuss them as matters where the interests of all are always linked, for better or worse, then there is much less risk that one person in the equation—the woman—will drop out of the discussion. Yet that is what often happens in dualistic, win-lose conflict-talk. As one commentator has said, “respect for the fetus is purchased at the cost of denying the value of women.”⁷² This tendency to erase the woman occurs frequently in medical discourse. Several leading obstetrical texts, when discussing delivery, fail to mention the woman—delivery is described as a matter between the baby and the doctor and his or her equipment.⁷³ Legal discourse is frequently guided by the male-based medical perspective, which, when matched with the erasing process of win-lose legal discourse, pushes the mother further into the recesses of invisibility. Dawn Johnsen offers an insightful analysis of how this process works: “[b]y separating the interests of the fetus from those of the pregnant woman, and then examining, often post hoc, the effect on the fetus of isolated decisions made by the woman on a daily basis during pregnancy, the state is likely to exaggerate the potential risks to the fetus and undervalue the costs of the loss of autonomy suffered by the woman.”⁷⁴ A chilling example of the process of obliterating the woman occurred in a case in which a court ordered a caesarean section performed on a woman over her religious objections. The mother virtually disappeared from the text, and certainly her autonomy was of little concern to the court, as the judge wrote that all that stood between the fetus and “its independent existence, was, put simply, a doctor’s scalpel.”⁷⁵ The court did not even say an incision in “the mother.” Just “a scalpel”—the mother was not mentioned as a person who would be cut by that scalpel, who would have to undergo risky surgery. She was not mentioned as someone whose health and existence were necessary to the child’s life; she was no more than an obstacle to the fetus’ life. And, in some instances when men challenge the right of a woman carrying an embryo they helped create to have an abortion, the woman gets discussed as a barrier to what is in the best interests of the man and the fetus—having the child—rather than as the

71 The amicus briefs for the National Abortion Rights Action League, et. al., in *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); and *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989), recount the experiences of women with unwanted pregnancy and abortion.

72 Farrel-Smith, *Rights-Conflict, Pregnancy and Abortion*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY* 27 (C. Gould ed. 1983).

73 See E. MARTIN, *supra* note 67.

74 Johnsen, *The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599, 613 (1986).

75 In the Matter of Madyun Fetus, 114 Daily Washington L. Rep. 2233, 2240 (D.C. Super. Ct. July 26, 1986).

human being most crucially necessary for and affected by having that child.⁷⁶

The legal approach to the problem of pornography as if it presented a conflict between women's and men's interests in not being objectified and degraded, and the societal interest in free speech, is another example of unproductive conflict-talk which limits our understanding of a problem and of women's experiences. The equation of not being degraded and objectified with the diluted word "interest" is troubling. The very thought that an abstract principle like free speech could be considered more important than working against domination, violence, injury, and degradation, and redressing the needs of those who have suffered from these things, is also disturbing. Talking about the pornography issue as presenting an inherent conflict with free speech, and thus simply a matter of balancing the weights of the respective interests, leaves the meaning and scope to be given to "speech" undiscussed. The conflict-talk also leaves the framework of free speech law unexamined. Yet the terms of that framework define moral harm to the consumers of pornography, and not physical harm to the people who are used to make it or are victimized by it, as the appropriate focus of legal concern.⁷⁷ The legal rhetoric also squeezes out from the debate the question whether there really is a conflict between "free speech" and women's civil rights.

The dichotomous, polarized, either/or framework of legal language also makes it a reductionist language—one that does not easily embrace complexity or nuance. Something either must be one way, or another. It cannot be a complicated mix of factors and still be legally digestible. The difficulty of discrimination law in responding to the situation of black women is one example. In some cases black women have been told by courts that they must choose between presenting their claim as a black or as a woman; they cannot proceed as both simultaneously even though that is what they are.⁷⁸ In other cases they have been told they have to choose between their race and their gender, and must bring their discrimination claims as "sex-plus" claims, or as "race-plus" claims.⁷⁹ This requires assigning a priority to either race or sex as the one principal factor in their lives, and subordinating the other as an add-on.

Joan Scott's analysis of the way the courtroom discourse twisted and resisted the complexity of the historians' arguments in the *EEOC v. Sears, Roebuck & Co.* trial is another powerful example of the reductionist ten-

76 See, e.g., *Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), cert. denied, 108 S. Ct. 2136; *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), aff'd mem., 526 N.E.2d 958 (Ind.); *Lewis v. Lewis*, Slip Op. No. 84149 (Mich. Ct. App. September 15, 1988), cert. denied sub nom. *Myers v. Lewis*, 109 S. Ct. 495. In each of these cases, the trial courts granted injunctions barring women from obtaining abortions. The appellate courts overturned the injunctions using an analysis that focused much more on the women than the analysis used by the respective trial courts. Compare medical language about birth, which uses metaphors of production and machinery to obliterate the human agency of women. See E. MARTIN, *supra* note 67.

77 See Finley, *Nature of Domination*, *supra* note 4.

78 See, e.g., *DeGraffenreid v. G.M. Assembly Div.*, 413 F. Supp. 142 (E.D. Miss. 1976); *Scarborough*, *supra* note 9.

79 See, e.g., *Jefferies v. Harris Ct'y Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980); *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1986).

dency of legal language.⁸⁰ The reductive insistence of legal language on a consistent yes/no position, a bottom line simple "answer," denied the possibility of shifting contexts and the need to resort to different lines of argument for different purposes. Thus, the efforts of labor historian Alice Kessler-Harris to elucidate the subtle interconnections between options employers make available to women, family role expectations for women, and women's own expectations for themselves, were dismissed in the courtroom. Kessler-Harris was not simply saying it was either all the employer's "fault" that there were few women hired for commissioned sales jobs, or all women's "free" choices made with reference to their own "desires," such as being with their families. As Scott explains, the historians were forced "to swear to the truth or falsehood of interpretive generalizations developed for purposes other than legal contestation, and they were forced to treat their interpretive premises as matters of fact."⁸¹ Opposing counsel ridiculed Kessler-Harris' efforts to explain her analysis about interactive effects and conditioned constraints that make choice illusory as inconsistent with her prior work. In this other work, however, she was addressing different needs and thus had stressed more the constraints posed by women's family situations, rather than the role of employers. The complexity of her argument, her inability to explain in yes-no terms, was, in the eyes of opposing counsel and the trial judge, disingenuousness. The historian tried to resist the way the legal language framed the problem, and the legal language judged her incredible. The law has a hard time hearing, or believing, other languages. That is part of its power.

One of the other languages that the law does not easily hear is that associated with the emotions, with expression of bursting human passion and aspirations. Law is a language firmly committed to the "reason" side of the reason/emotion dichotomy. Indeed, the law distrusts injuries deemed emotional in character; it suspects them as fraudulent, as feigned, as not important. The inability to hear the voice of emotion, to respond to thinking from the emotions, is one of the limitations of the legal voice. There are some things that just cannot be said by using the legal voice. Its terms depoliticize, decharge, and dampen. Rage, pain, elation, the aching, thirsting, hungering for freedom on one's own terms, love and its joys and terrors, fear, utter frustration at being contained and constrained by legal language—all are diffused by legal language. Thus, Derrick Bell resorts to fantasy to express far more powerfully than reasoned legal analytic language ever could the hope-frustration-tension-push-gain-get contained relationship between African-Americans and white american law.⁸² Alice Walker speaks about the ways in which the term "civil rights" is a bureaucratic, placating term, how the translation of it by the tongues of some blacks to "silver writes" so much better expresses the desire to break all boundaries, the desire of a black man

80 See Scott, *Deconstructing Equality*, *supra* note 5.

81 *Id.* at 41.

82 See D. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Bell, *Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

"to run naked on a beach . . . in Alabama."⁸³ Patricia Williams resorts to the allegorical and metaphorical signifying language of literature to express her reality of being a black woman in America, and to express her relation to the legal system that once saw her family members as the object of property law.⁸⁴ And Audre Lord reminds us that, especially for women of color, who have been most invisible to and silenced by legal, analytic and reasoned language, "poetry is not a luxury" but an essential means of expression, of self-articulation and definition, of survival.⁸⁵

Because law is a language of authoritative interpretations, those who come to it must try to fit their version of events into its terms. But because legal language is assumed to be legitimate for all, because it understands itself as being aperspectived, it does not even comprehend that there might be fit or translation problems. Kessler-Harris is not seen sympathetically by the judge as an historian working with the language of another discipline trying to explain as best she could within the alien terms of the law, but as a befuddled, contradictory person whose account could not be credited at all.

Examples of the "fit" problem can be found throughout law. How can we fit a woman's experience of living in a world of violent pornography into obscenity doctrine, which is focused on moral harm to consumers of pornography?⁸⁶ How can women fit the reality of pregnancy into equality doctrine without getting hung up on the horns of the sameness-difference dilemma? How can women fit the difference between a wanted and an unwanted pregnancy into the doctrinal rhetoric of privacy and "choice"?⁸⁷ This rhetoric presumes a sort of isolated autonomy alien to the reality of a pregnant woman.⁸⁸ How can women fit the psychological and economic realities of being a battered woman into criminal law, which puts the word "domestic" before "violence"? This choice of terminology reduces the focus on the debilitating effects of violence and increases attention to the fact that the setting is the home, an environment in which we are all supposedly free to come and go as we "choose." How can women fit the way incest victims repress what has happened to them until the memory is released by some triggering event in adulthood with the narrow temporal requirements of statute of limitations law? How can women fit the fact that this crime, and others of sexualized violence against women, so often happens behind closed doors with no "objective witnesses," into the proof requirements of evidentiary law? How, as Kristin Bumiller explores in her article, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*,⁸⁹ can we fit the experience of having what a woman thought was a pleasant social interaction

83 A. WALKER, *Silver Writes*, in *IN SEARCH OF OUR MOTHERS' GARDENS: WOMANIST PROSE* 335 (1983).

84 Williams, *On Being the Object of Property*, 14 SIGNS: J. WOMEN IN CULT. & SOC'Y 5 (1988).

85 A. LORDE, *Poetry is Not a Luxury*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 36 (1984).

86 See, e.g., Finley, *Nature of Domination*, *supra* note 4.

87 See, e.g., Ashe, *Zig-Zag Stitching*, *supra* note 2.

88 See West, *Women's Hedonic Lives*, *supra* note 49. Cf. A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* (1988) (examination of how prevalent rationales for privacy fail to capture the reasons why women need privacy in their lives).

89 42 U. MIAMI L. REV. 75 (1988).

but then crosses the invisible line to become threatening violence, into rape doctrine? Rape law focuses on sex, not on violence. It focuses on the woman's consent to sex, from the male point of view—and so it presumes that any indication of assent to social interaction is also assent to “do what the man wants.”⁹⁰ How, as Lucie White asks in her paper, *Unearthing the Barriers to Women's Speech: Notes Toward a Feminist Sense of Procedural Justice*,⁹¹ can a black mother on welfare ever convey her world to the welfare bureaucracy that is charging her with an overpayment because she followed its erroneous advice and spent an injury insurance check? What is important to this woman is that she did nothing wrong, and that she was able to buy her children Sunday shoes. But what is relevant to the state's welfare law is not her view of right and wrong, or her own understanding of what was necessary for her family—in her world, having Sunday shoes was essential to human dignity—but whether the items she bought with the insurance check fit the state's definition of “necessities” of life.⁹²

Legal language frames the issues, it defines the terms in which speech in the legal world must occur; it tells us how we should understand a problem and which explanations are acceptable and which are not. Since this language has been crafted primarily by white men, the way it frames issues, the way it defines problems, and the speakers and speech it credits, do not readily include women. Legal language commands: abstract a situation from historical, social, and political context; be “objective” and avoid the lens of nonmale experience; invoke universal principles such as “equality” and “free choice;” speak with the voice of dispassionate reason; be simple, direct, and certain; avoid the complexity of varying, interacting perspectives and overlapping multi-textured explanations; and most of all, tell it and see it “like a man”—put it in terms that relate to men and to which men can relate.

Feminist theory, on the other hand, which is not derived from looking first to law, but rather to the multiple experiences and voices of women as the frame of reference, tells us to look at things in their historical, social, and political context, including power and gender; distrust abstractions and universal rules, because “objectivity” is really perspectived and abstractions just hide the biases; question everything, especially the norms or assumptions implicit in received doctrine, question the content and try to redefine the boundaries;⁹³ distrust attributions of essential difference and acknowledge that experiences of both men and women are multiple, diverse, overlapping and thus difference itself may not be a relevant legal criterion;⁹⁴ break down hierarchies of race, gender, or power; embrace diversity, complexity, and contradiction—give up on the need

90 See S. ESTRICH, *supra* note 44.

91 See L. White, *supra* note 26.

92 *Id.* at 2-12, 50-52.

93 For a discussion of how examining women's situations and then applying them to law requires changing disciplinary boundaries and creating wholly new disciplines, see Norwegian Law Professor Tove Stang-Dahl's description of the Women's Law program at the University of Oslo in Norway. Stang-Dahl, *Taking Women as a Starting Point: Building Women's Law*, 14 INT'L J. SOC. OF L. 239 (1986).

94 See, e.g., Scott, *Deconstructing Equality*, *supra* note 5.

to tell "one true story" because it is too likely that that story will be the story of the dominant group;⁹⁵ listen to the voice of "emotion" as well as the voice of reason and learn to value and legitimate what has been denigrated as "mere emotion."⁹⁶

III. Dealing With the Dilemma of Legal Language

So, what's a woman do? Give up on law, on legal language entirely? Disengage from the legal arena of the struggle? Neither of these strategies is really an available option. We cannot get away from law, even if that is what we would like to do. As Sandra Harding has said, "[w]e do not imagine giving up speaking or writing just because our language is deeply androcentric; nor do we propose an end to theorizing about social life once we realize that thoroughly androcentric perspectives inform even our feminist revisions of the social theories we inherit."⁹⁷ Because law is such a powerful, authoritative language, one that insists that to be heard you try to speak its language, we cannot pursue the strategy suggested by theorists from other disciplines such as the French feminists, of devising a new woman's language that rejects "phallogocentric" discourse.⁹⁸

Nor can we abandon caring whether law hears us. Whether or not activists for women look to law as one means for pursuing change, the law will still operate on and affect women's situations. Law will be present through direct regulation, through nonintervention when intervention is needed, and through helping to keep something invisible when visibility and validation are needed.⁹⁹ Law will continue to reflect and shape prevailing social and individual understandings of problems, and thus will continue to play a role in silencing and discrediting women.

95 For example, white feminists tend to tell a story of women's true situation that excludes the differing situations of poor women and women of color and women of different ethnic backgrounds. For developments of this critique of white feminism by other white feminists, see E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1989); Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989).

96 For examples of work that seeks to value the voice of caring, see C. GILLIGAN, *supra* note 27; N. NODDINGS, *CARING—A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* (1984); S. RUD-DICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989); Bender, *supra* note 33; and Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS: J. WOMEN IN CULT. & SOC'Y 644 (1987).

The elements of feminist theory I have laid out in this paragraph are themselves not universal characteristics of a unified, universal feminist theory. They are the elements of where I am at in my feminist thinking about law, drawn from many sources. Some of my more post-modernist, post-structuralist claims will be particularly controversial, but I have found feminist works from this intellectual movement most helpful to my thinking about the nature of law and how we can work to change its meanings. See, e.g., S. HARDING, *SCIENCE QUESTION*, *supra* note 46; Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 SIGNS: J. WOMEN IN CULT. & SOC'Y 621 (1987); Scott, *Deconstructing Equality*, *supra* note 5.

97 S. HARDING, *SCIENCE QUESTION*, *supra* note 46, at 10.

98 For examples of the French feminist theory, see L. IRIGARAY, *THIS SEX WHICH IS NOT ONE* (C. Porter trans. 1985), and *SPECULUM OF THE OTHER WOMAN* (G. Gill trans. 1985); Cixous, *Laugh of the Medusa*, in *NEW FRENCH FEMINISMS*, *supra* note 28. Note that one of the French feminist language theorists, Julia Kristeva, proposes critical engagement with the existing language as a way to change it. See Nye, *Woman Clothed with the Sun*, *supra* note 1.

99 For a discussion of these three ways in which law intervenes, even when it is not seeming to do so, see K. O'DONOVAN, *SEXUAL DIVISIONS IN LAW* 11-19 (1985); see also Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).

Since law inevitably will be one of the important discourses affecting the status of women, we must engage it. We must pursue trying to bring more of women's experiences, perspectives, and voices into law in order to empower women and help legitimate these experiences. But this is not as easy as it sounds, because there is no "one truth" of women's experiences, and women's own understandings of their experiences are themselves affected by legal categorizations.

To the extent that the law's authoritative definitions are based on male perspectives, much of women's own understandings of things whose meaning is greatly influenced by legal definitions—such as rape or equality—will be constructed with reference to the male meanings. So the feminist project of incorporating "women's experience" into legal definitions is not as simple as "one, figure out who or what is 'women'; two, consult women's experience; and three, add it to law and stir." Women's experiences are diverse and often contradictory; and there is no true women's experience unaffected by social construction, which includes legal construction, which includes male defined understandings. How many women have thought of themselves as not having been "raped," when they know that what happened to them did not match the legal definition of rape which informs the social understanding of rape?¹⁰⁰ How many women have thought of themselves as not victims of discrimination when the law says they are different because they are pregnant or capable of becoming pregnant, or subject to greater health risks, or too short, or not strong enough, or working in jobs and at rates of pay they have freely chosen to accept, or not reacting to workplace "horseplay" (manplay)¹⁰¹ the way a reasonable "person" would?

The answer to both questions is many, some, but not all, and not the many or some totally. There may be instances of dissonance, of resistance, and of wondering if the legal definition is really right. A woman may still feel violated and coerced even though she was not "raped," and she may begin to wonder if maybe feeling violated and coerced is so much like being raped that she was raped even though she knew the man and agreed to go to his room. A woman may still feel that she was treated unfairly or was not really given any choice or was expected to accept something that really disturbed her or hurt her, and that all this was because she had no power. She may then begin to suspect that the lack of power, and thus the way she was treated has something to do with the fact that she is a woman, and she may wonder whether maybe this is what discrimination is really all about anyway. The dissonances, resistances, and wonderings are also part of women's experiences. Once they are articulated and shared with other women, understandings often be-

100 The title of Robin Warshaw's study for *Ms. Magazine* of date and acquaintance rape, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE* (1988), is instructive. See *infra* note 103.

101 Horseplay is a particularly inappropriate term. Horses at play nuzzle and nip, but they also definitely know the difference between a playful, welcomed/welcoming nip, and a "keep away from me" bite or kick. Horses do not sexually harass each other. So, we should stop calling such workplace behavior horseplay, or child's play, and call it the "play" of the only group that thinks it is an amusing game—men.

gin to change.¹⁰² Legal activists can explore these voices of dissonance, these barely audible questions. They can embrace the fact that women have many very different experiences and can start working into the law the questions raised by women's challenges to the prevailing legal constructions of situations. For example, as women themselves started to talk to each other about experiences of violently coerced sex on dates, and these women talked to other women who had been raped in the conventional sense, the similarities between the way their experience made them feel and the recognized rape became apparent. And so they began to question whether maybe they, too, had been "raped." This opening in women's understandings is now being used to change the legal understanding of rape as something that only happens between strangers.¹⁰³

In engaging the law over the meaning of women's experiences, people representing women must remain constantly critically aware of the dilemma of legal language, of its simultaneous power and limitations. While its power can help women by validating and affecting societal consciousness about women's situations, its power also has a negative aspect. Precisely because it is an authoritative discourse, it demands that we try to speak within its confines—it threatens us with not being heard or credited if we do not. The patriarchal bias in legal language, and its limited way of framing and envisioning situations, can easily distort what women have to say. It can put women on the defensive, because of their "difference" from men. It can force women to respond to sameness/difference arguments, public/private arguments, or free speech arguments, not on women's own terms, but on the terms of the traditional arguments. This creates a stark dilemma: in light of the power of existing meanings, can we change the meanings of terms while still using those terms?

By talking about family/work conflicts, are we helping to reinforce the view of these two worlds as separate spheres? Are we continuing to privilege the existing definition of work, and are we shoring up the notion of family as two opposite sex parents, with some number of children? By using the term "equality," are we helping to keep the focus on women and their differences from men, thus reinforcing the male norm? Or is it possible to use this term in a way that makes women's experiences the reference point,¹⁰⁴ and shifts attention to structures and values of the workplace?¹⁰⁵ Even if we modify "rape" with "date" or "acquaintance," are we leaving unchallenged the baggage that comes

102 This was the essential philosophy of the feminist methodology of consciousness raising. See, e.g., A. SHREVE, *WOMEN TOGETHER, WOMEN ALONE: THE LEGACY OF THE CONSCIOUSNESS-RAISING MOVEMENT* (1989). Catherine MacKinnon posits consciousness raising as the cornerstone of feminist methodology, see *SIGNS* I, *supra* note 27.

103 See, e.g., R. WARSHAW, *I NEVER CALLED IT RAPE*, *supra* note 100; S. ESTRICH, *supra* note 44.

104 Justice Marshall's opinion in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), does, to a significant extent, use women's needs as the reference point for the equality analysis, which certainly suggests that it is possible to do so. See Minow, *supra* note 7. Despite its analytical progress, the *Cal-Fed* opinion still keeps us locked in a comparative, dichotomized view of differences, and it still defines differences themselves as the relevant issue.

105 For suggestions of how this shift in emphasis might be accomplished, see Finley, *Transcending Equality*, *supra* note 22; Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV 79 (1989).

along with the "r" word—that this is a crime of sex, in which women's consent is the main issue, rather than a crime of violence in which the violator's conduct is the issue?¹⁰⁶ If we capitulate to the language of private choice in the abortion debate, are we losing sight of the reasons why, beyond privacy and choice, control over one's reproductive destiny is so essential to women's position in a society of male domination?¹⁰⁷ Are we leaving ourselves wide-open to the moral high ground of the term "pro-life" when all we can juxtapose against it is "choice," rather than freedom and equality? The word "choice" can seem as trivial as the color of one's clothes or one's preferred brand of car, when it is life that some say they are fighting for.

There have been examples of promising word changes and consequent meaning changes in legal discourse. Consider the now widespread use of the term "sexual harassment," for what used to be considered a tort of invading individual dignity or sensibilities; the term "battering" for domestic violence. But even these language changes get confined by the legal frameworks into which they are placed. For example, the individualistic and comparative discrimination framework now applied to sexual harassment leaves some judges wondering about bisexual supervisors as a means to deny that discrimination is what is occurring.¹⁰⁸ The contract model of damages in discrimination law means that the dignity and personal identity values that tort law once recognized often go undercompensated.¹⁰⁹ And the use of the term "sexual assault" in place of "rape" in some rape reform statutes has not obviated the problems of "objective" male-perspectived judgments of female sexuality and consent.¹¹⁰

It is not my purpose to offer a simple, neat, for all times solution to the dilemma of legal language. Indeed, to even think that is possible would be contradictory to my message—it would be a capitulation to the legal ways of thinking that I seek to destabilize in order to expand. But I am not without solutions to the dilemma of the gendered nature of legal reasoning. The message of this Article presents one solution: critical awareness of the dilemma is itself important. Awareness encourages thinking critically about whose perspective has informed a term or doctrine, and about the norms or assumptions upon which the term may rest. This leads to self-conscious strategic thinking about the philosophical and political implications of the meanings and programs we do en-

106 See, e.g., Bumiller, *Rape as a Legal Symbol*, 42 U. MIAMI L. REV. 75 (1988); S. ESTRICH, *supra* note 44.

107 See, e.g., MacKinnon's discussion of why abortion is an equality issue, not a privacy issue. See, C. MACKINNON, *supra* note 23, at 93-102.

108 See, e.g., Judge Bork's dissenting opinion in *Meritor Sav. Bank v. Vinson*, 753 F.2d 141 (D.C. Cir. 1985).

109 See, e.g., Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 (1986).

110 See, e.g., E. SHEEHY, PERSONAL AUTONOMY AND THE CRIMINAL LAW: EMERGING ISSUES FOR WOMEN, BACKGROUND PAPER FOR THE CANADIAN ADVISORY COUNCIL ON THE STATUS OF WOMEN 19-28 (Sept. 1987); Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980); Dawson, *Legal Structures: A Feminist Critique of Sexual Assault Reform*, 14 RESOURCES FOR FEMINIST RESEARCH No. 3 at p. 42 (Nov. 1985); Boyle, *Sexual Assault and the Feminist Judge*, 1 CAN. J. WOMEN & L. 99 (1985).

dorse.¹¹¹ For example, just what are the implications of arguing either sameness or difference? If both have negative implications, then this should suggest the need to reframe the issue, to ask previously unasked questions about the relevance or stability of differences,¹¹² or about the role of unexamined players such as employers and workplace structures and norms. Critical thinking about norms and what they leave unexamined opens up conversations about altering the norms and thus the vision of the problem. This leads to thinking about new ways of reasoning and talking. It leads to offering new definitions of existing terms; definitions justified by explorations of context and the experiences of previously excluded voices. Or, it leads to thinking about offering wholly new terms.

In addition to critical engagement with the nature of legal language, another promising strategy is to sow the mutant seeds that do exist within legal reasoning. My previous description of legal reasoning is obviously overly general. It highlights tendencies or widely held assumptions about the nature of law. But this description, too, can be deconstructed. For example, while law is generally ahistorical and abstract in its highest pronouncements of doctrine, it is also a fact-driven system, one that works with and exploits variations between situations.¹¹³ Because legal reasoning can be sensitive to context, we can work to expand the context that it deems relevant. By pulling the contextual threads of legal language, we can work towards making law more comfortable with diversity and complexity, less wedded to the felt need for universalizing, reductive principles.

The law's oft-proclaimed values of equity and fairness can also work as mutating agents. The equity side of law counsels taking individual variations and needs into account. Arguments about when this should be done in order to achieve fairness must proceed with reference to context, to differing perspectives, and to differing power positions. The more we can find openings to argue from the perspective of those often overlooked by legal language, such as the people upon whom the legal power is being exercised, or those disempowered or silenced or rendered invisible by the traditional discourse,¹¹⁴ the more the opportunities to use the engine of fairness and equity to expand the comprehension of legal language.

111 See, e.g., Scott, *Deconstructing Equality*, *supra* note 5, at 36.

112 See *id.* at 45; Finley, *Transcending Equality*, *supra* note 22.

113 For example, some aspects of the doctrinal deconstruction engaged by some critical legal theorists are simply very good legal reasoning, or playing the "what about, what if" game of law professors very, very well.

114 See Minow, *supra* note 7.